



Long Article

## Union v. State: The Constitutionality of The National Investigation Agency Act, 2008 and The Dilemma of Federalism

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**Abstract:** *The Constitution of India provides for a dual polity where we have a Union Government and the State Government. The Constitution also provides for the legislative competence for both the Union Government and the State Government. The Schedule VII of the Constitution provides for subject matters for Union and State respectively, where some entries mentioned in the lists are of similar nature. Such entries lead to repugnancy in-laws. The constitution provides that the parliament enacted law shall prevail over the State law when a concurrent subject matter is concerned. The tussle between the Union and the State for legislative competence and enacting of laws is infinite. The difficulty arises when the Union enacted laws overlap with the State Subject. The National Investigation Act, 2008 is a Parliamentary enacted law empowering a Union level investigative force. This act has created a question on the meaning of the structure of Federalism in Indian polity and the legislative competence of Parliament. The States submit that the Agency is similar to the police force and out of legislative competence of parliament and it weakens the Federal structure. The paper critically analyses the legislative competence of the parliament to enact such an act. Further, it analyses the provisions of the National Investigation Agency Act, 2008 to understand if they are arbitrary and whether they hold power to infringe the Federal structure and disregard the autonomy of the States.*

**Keywords:** *Constitution, Federalism, National Investigation Agency Act, 2008, Police, State.*

## Introduction

The Indian constitution accommodates both the features of Unitary constitution as well as the Federal Constitution.<sup>1</sup> The Union list, State List and the Concurrent List mentioned in the schedule VII of the Indian Constitution signify that Indian Democracy is Federal,<sup>2</sup> where the Union and States have predetermined subject matters with a concurrent list that symbolises the Federal structure. A tussle is witnessed often between the Union and the States relating to the scope of legislative powers between the two. In Indian Democracy the power is inclined towards the Union.<sup>3</sup> A frictionless functioning of the System is possible when the Union respects the sovereignty of the States. The attempt of the Union Government to act out of their scope of legislative competence and entering into the legislative sphere has always resulted in chaos. The Constitution allows the Union to make laws under the Union List and concurrent list of schedules VII and in case of a repugnancy between Union law and State law, the former shall prevail. The question arises that to what extent the Union can make law under the Union list and Concurrent list. Does the Union have the power to make a law Under List I and III that trespasses a State List subject in its entirety?

After the attacks of 26/11 on the city of Mumbai, the entire country was struck with fear. In 2008 the National Investigation Agency Act was introduced by the then Home Minister Mr P. Chidambaram to counter such terror-related activities; the bill was passed with minimal opposition.<sup>4</sup> Since its inception, the NIA has been under the scanner for its constitutional validity. The National Investigation Agency Act, 2008 is alleged to be unconstitutional as the investigation of offences is under the purview of the Police that is an exclusive State subject under List II of

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<sup>1</sup> Shreya, *Quasi-Federal Nature of Indian Constitution*, LEGAL SERVICES INDIA, <http://www.legalservicesindia.com/article/2245/Quasi-Federal-Nature-of-Indian-Constitution.html> (last visited July 7, 2020).

<sup>2</sup> Abdul Khader Kunju S, *Explainer: Here's How Handing Over UAPA Cases to NIA Affects the Federal System*, THE WIRE (Jan. 20, 2020), <https://thewire.in/government/uapa-nia-act-centre-state>.

<sup>3</sup> Uzzair, *Federalism under the Indian Constitution – Meaning and Features*, IPLEADERS (Feb. 6, 2016), <https://blog.ipleaders.in/what-is-federalism/>.

<sup>4</sup> Explained desk, *Explained: What is National Investigation Agency Act, and why is Chhattisgarh challenging it?*, INDIAN EXPRESS (Jan. 17, 2020, 1:36 pm), <https://indianexpress.com/article/explained/explained-what-is-the-nia-act-and-why-is-chhattisgarh-challenging-it-6219106/>.

VIIIth Schedule. Also, the provisions of the NIA Act are arbitrary in nature and they violate the Federal structure and destroy the autonomy and sovereignty of the States.

### **Enactment of the National Investigation Agency Act, 2008**

On 26<sup>th</sup> November 2008, India witnessed one of the deadliest attacks on the country.<sup>5</sup> In response to the attacks, the Government amended the Unlawful Activities Prevention Act 1967 and enacted the National Investigation Agency Act 2008.<sup>6</sup> The amendment to the law helped in giving more and wide power to investigate terrorist activities.<sup>7</sup> The NIA Act enabled the agency to prosecute in the entire country without asking for permission from any state governments.<sup>8</sup> The NIA in India is similar to the FBI (Federal Bureau of Investigation) of the United States and holds more power than CBI.<sup>9</sup> The NIA Act enabled the agency to prosecute under the following acts:

- “1. The Atomic Energy Act, 1962.
2. The Unlawful Activities (Prevention) Act, 1967.
3. The Anti-Hijacking Act, 1982.
4. The Suppression of Unlawful Acts against Safety of Civil Aviation Act, 1982.
5. The SAARC Convention (Suppression of Terrorism) Act, 1993.
6. The Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002.
7. The Weapons of Mass Destruction and Their Delivery Systems (Prohibition of Unlawful Activities) Act, 2005.
8. Offences under:

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<sup>5</sup> Sarita Azad and Arvind Gupta, A Quantitative Assessment on 26/11 Mumbai Attack using Social Network Analysis, 2 Journal of Terrorism Research 4 (2011).

<sup>6</sup> Paresh Bihari Lal, The New Indian Anti-Terror: Distinguishing Myth and Reality, 2 GNLU L. Rev. 114 (2010).

<sup>7</sup> *Id.*

<sup>8</sup> Surabhi Chopra, National Security Laws in India: The Unraveling of Constitutional Constraints, 17 Or. Rev. Int'l L. 1 (2015).

<sup>9</sup> *Supra* note 4.

(a) Chapter VI of the Indian Penal Code, 1860 [Sections 121 to 130 (both inclusive)].

(b) Sections 489-A to 489-E (both inclusive) of the Indian Penal Code (45 of 1860).<sup>10</sup>

### **Amendment (2019) of National Investigation Agency Act, 2008**

The amendment in 2019 to the NIA Act provides that special courts will be formed to prosecute offences such as UAPA etc.<sup>11</sup> It allows the NIA to designate sessions Court as special courts for NIA proceedings.<sup>12</sup> After the 2019 amendment, the NIA's jurisdiction of crimes was also increased.<sup>13</sup> Now they can also investigate matters under.

“(i) human trafficking, (ii) offences related to counterfeit currency or banknotes, (iii) manufacture or sale of prohibited arms, (iv) cyber-terrorism, and (v) offences under the Explosive Substances Act, 1908.”<sup>14</sup>

Also, now the NIA officers have the power to investigate crime outside the Indian Territory as well but subject to international treaties and conventions.<sup>15</sup>

### **Constitutionality Challenge of National Investigation Agency Act, 2008**

In 2012 a Criminal Writ Petition was filed before the Hon'ble Bombay High Court in which the constitutionality of the National Investigation Agency Act 2008 came in question.<sup>16</sup> The Division bench in *Pragya Singh Chandra Pal Singh Thakur v. National Investigation Agency*<sup>17</sup> decided the constitutionality of the National Investigation Agency Act on October 11<sup>th</sup>, 2013.

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<sup>10</sup> Anurag Deep and Fawaz Shaheen, National Investigation Act 2008: Constitutionality, Desirability and Feasibility, 23 ALJ 174 (2015).

<sup>11</sup> *Supra* note 4.

<sup>12</sup> §22, National Investigation Agency Act, 2008, No. 34 of 2008, INDIA CODE (2008).

<sup>13</sup> Hemant Singh, *The National Investigation Agency (NIA): Establishment and Functions*, JAGRAN JOSH (May. 29, 2020 5:42 PM), <https://www.jagranjosh.com/general-knowledge/nia-amendment-bill-1564041643-1>.

<sup>14</sup> *The National Investigation Agency (Amendment) Bill, 2019*, PRS LEGISLATIVE RESEARCH, <https://www.prsindia.org/billtrack/national-investigation-agency-amendment-bill-2019> (last visited May 3, 2020).

<sup>15</sup> *Id.*

<sup>16</sup> Criminal Writ Petition No.4049 of 2012.

<sup>17</sup> *Pragya Singh Chandra Pal Singh Thakur v. National Investigation Agency*, 2013 SCC OnLine Bom 1354.

It was stated that the Parliament does not encompass the competence to enact such an Act, because police is a subject matter of the state as per the VIIth schedule, list two, entry two and the NIA Act makes a police force at the national level and totally encroaches upon such power of the state.<sup>18</sup> The NIA Act was passed without any dissent in Parliament due to the attacks of 2008.<sup>19</sup> The law is well settled that the transfer of cases for certain offences from one agency to another is by powers of the Hon'ble High Court under Article 226 and 227 or by the inherent power of the Hon'ble Supreme Court, the section 6 of the NIA is ambiguous and abrogates the power of the courts to transfer cases.<sup>20</sup>

The NIA stated that the Agency does not encroach on police powers instead they are in place to make the law enforcement improved and better, the Union is responsible for the national safety and integrity of the nation and the NIA helps in tackling cross-border crimes with inter-state and international origins.<sup>21</sup> Mr Setalvad, the Additional Solicitor General for India appearing on behalf of National investigation Authority stated that the Union government is responsible for the sovereignty, security and integrity of the nation and the NIA helps in investigation of all such offences that affect the foreign relations, international treaties, conventions etc.<sup>22</sup> The NIA investigates scheduled offences that have Pan-India repercussions since the State police machinery cannot investigate such matters with given jurisdiction and resources, the claim of encroachment of power of state list is erroneous.<sup>23</sup> Also, the National Investigation Agency falls under entry 1, 10, 14 of the union list and entry 8 of the same list can be referred.<sup>24</sup>

The court was of the view that if entry 8 of the List I can enable the Parliament to set up a Central Bureau of Investigation, then it does not restrict to enact a National level Investigation Agency to investigate and prosecute offences affecting national sovereignty and security and it is not similar to setting up a police force.<sup>25</sup> The Court held *"it is by now well settled those various entries*

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<sup>18</sup> *Id.* at para 14.

<sup>19</sup> *Supra* note 17 at para 16.

<sup>20</sup> *Supra* note 17 at para 18.

<sup>21</sup> *Supra* note 17 at para 22.

<sup>22</sup> *Supra* note 17 at para 47.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Supra* note 17 at para 80.

*in three lists are not powers of legislation but fields of legislation.*<sup>26</sup> The legislative power is given by Article 246<sup>27</sup> of the Constitution and the language of the entries must be read in the widest of amplitude.<sup>28</sup> The parliament has the power to enact laws in relation to police force of the union territories, then the parliament cannot be said to be incompetent to make laws in respect to NIA that also when the NIA can investigate only matters scheduled in the NIA Act.<sup>29</sup> The entries in the list are worded widely enough and to hold that Parliament is incompetent to enact NIA Act is unduly restricting the power of the Parliament.<sup>30</sup> After the application of Pith and Substance Doctrine to find the true nature of law, the NIA does not create a new offence and is responsible to prosecute offences made by Parliament referable to entries of List I.<sup>31</sup> Hence the NIA falls under Entry II of List III that is the criminal procedure after Doctrine of Pith and Substance is applied.<sup>32</sup> When the Parliament can create offences by virtue of the List then the Parliament is duly competent to make an agency to investigate and prosecute such offences.<sup>33</sup>

The Division Bench of the Hon'ble High Court of Bombay upheld the constitutionality of National Investigation Agency Act, 2008 and held that by Virtue of entries given in List I & List III the Parliament is competent to create such an investigative Agency. It is also well settled that the Parliament can enact a statute on basis of several Entries of the Lists.<sup>34</sup>

In December 2019, the state of Chhattisgarh filed a plaint under Article 131 of the Constitution<sup>35</sup> claiming that the Parliament lacks the competence of enacting the National Investigation Agency Act, 2008. The powers are given to the defendants i.e., the NIA is arbitrary and uncontrolled.

*“The NIA Act leaves no room for coordination or obtain consent from the State government before the Central agency takes over the investigation, the plaintiff further highlights. Such a*

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<sup>26</sup> *Supra* note 17 at para 89.

<sup>27</sup> INDIA CONST. art. 246.

<sup>28</sup> *Supra* note 17 at para 89.

<sup>29</sup> *Supra* note 17 at para 90.

<sup>30</sup> *Id.*

<sup>31</sup> *Supra* note 17 at para 92.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Supra* note 17 at para 91.

<sup>35</sup> INDIA CONST. art. 131.

*scheme of things, "clearly repudiates the idea of state sovereignty as envisaged under the Constitution of India".*"<sup>36</sup>

*The plaintiff stated that the NIA is ultra vires as well as against the Federal spirit where both state and Centre are independent and respect each other's jurisdiction as per the constitution.*

The plaintiff has prayed before the Hon'ble Supreme Court to declare the National Investigation Agency Act, 2008 unconstitutional or declare the Sections 6, 7, 8 & 10 of the National Investigation Agency Act, 2008 as ultra vires to the Constitution of India.

### **National Investigation Agency Act, 2008 and State Consent**

Section 6 of the NIA Act empowers the Union Government to ask the Agency to investigate scheduled offences if the Government seems fit. This means that the Union Government doesn't require for permission or consent from any State before the NIA starts investigation in the territory of the state, and therefore the Union can ask the NIA to investigate matters that are even remotely related to the scheduled offences. The NIA need not even consult with the State Government unlike the Narcotic Drugs and Psychotropic Substances Act, 1985 where Section 53 provides for "*after consultation with the state governments*"<sup>37</sup> or the Delhi Special Police Establishment Act, 1946 i.e., Central Bureau of Investigation (CBI) where section 6<sup>38</sup> clearly demands the consent of the State Government for any investigation.

Assuming the competence of the Parliament in enacting such an Act, the Section 6 and 8 of the NIA Act leaves a colossal space for the Central Government to act arbitrarily in the territory of any State that destroys the very essence of Federalism and Democracy. The Hon'ble Supreme Court has held that Federalism is the part of the basic structure of the Indian Constitution.<sup>39</sup> Further the *Suo Moto* cognisance power given to the Union government<sup>40</sup> allows the centre to initiate proceedings against anyone in the State is arbitrary. This may allow the central

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<sup>36</sup> Meera Emmanuel, *Breaking: State of Chhattisgarh files plaint challenging constitutionality of NIA [Read Plaint]*, BAR AND BENCH (Jan. 15, 2020, 1:52 PM), <https://www.barandbench.com/news/litigation/breaking-state-of-chhattisgarh-files-plaint-challenging-constitutionality-of-nia-read-plaint>.

<sup>37</sup> §53, Narcotic Drugs and Psychotropic Substances Act, 1985, No. 61 of 1985, INDIA CODE (1985).

<sup>38</sup> §6, Delhi Special Police Establishment Act, 1946, No. 25 of 1946, INDIA CODE (1946).

<sup>39</sup> S. R. Bommai and Ors. v. Union of India and Ors, (1994) 3 SCC 1.

<sup>40</sup> §6(5), National Investigation Agency Act, 2008, No. 34 of 2008, INDIA CODE (2008).

Government to act malefice against anyone whose offence may actually be a part of the Indian Penal Code and not a scheduled offence under the NIA Act and responsibility of the State Police Officials. Taking reference to the Unlawful Activities (Prevention) Act, 1967, the act after the 2019 amendment provides that an individual involved in any unlawful activity can be declared as a terrorist. This creates a possibility that where an offence committed by a person falls under the Penal Code, the Centre may act upon it and through the garb of NIA and the UA(P)A and the person is prosecuted. This snatches away the police power, which is arbitrary, and also destructs the meaning of Federalism.

The NIA Act provides that the Agency will investigate scheduled offences under the said Act but, if there are any connected offences with the scheduled offence then the Agency can investigate the other offences as well.<sup>41</sup> Therefore, the NIA can take over the charge from the Police officer under Section 6<sup>42</sup> of the NIA Act and then investigate offences outside the Act under section 7 of the said Act.<sup>43</sup> Meaning that the NIA can overtake the investigating power from the Police and act as the police without the consent from the State despite the fact that both Public order and Police both are exclusive entries in the State list.

## **National Investigation Agency and The Scheduled Offences**

The National Investigation Agency Act, 2008 was brought with the intention to fight against terrorism and terror-related activities. The National Investigation Agency Act, 2008 contains chapter VI<sup>44</sup> in its entirety, Sections 370 and 370A of Chapter XVI, Sections 489-A to 489-E (both inclusive) of the Indian Penal Code. Also, section 66F<sup>45</sup> of the Information Technology Act, 2000 among other scheduled offences. The offences under the NIA Act shall be such offences that relate to terrorism in order to align with the objective with which the NIA Act was enacted.

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<sup>41</sup> §8, National Investigation Agency Act, 2008, No. 34 of 2008, INDIA CODE (2008).

<sup>42</sup> §6, National Investigation Agency Act, 2008, No. 34 of 2008, INDIA CODE (2008).

<sup>43</sup> §7, National Investigation Agency Act, 2008, No. 34 of 2008, INDIA CODE (2008).

<sup>44</sup> PEN. CODE. 1860, (45 of 1860).

<sup>45</sup> § 66F, Information technology Act, 2000, No. 21 of 2000, INDIA CODE (2000).



As per Black's Law Dictionary, the definition of terrorism is:

*"Act of terrorism" means an activity that involves a violent act or an act dangerous to human life that is a violation of the criminal laws of the United States or any other state...."*<sup>46</sup>

As per the Oxford Dictionary, the definition of terrorism is:

*"The use of violent action in order to achieve political aims or to force a government to act"*<sup>47</sup>

Taking reference to chapter VI of the Penal Code that provides for offences committed against the state. The chapter now being under scheduled offences of the NIA Act may allow the Union to prosecute on personal bias. It is very commonly seen than there remains a political dispute between different political parties especially when the Union Government and the State Government are ruled by different parties respectively. Taking reference of the act of Sedition<sup>48</sup>, the offence being part of Chapter VI of IPC is prone to be misused as it allows the Central Government to act against any political person or ordinary citizen with bias, even if there is merely constructive criticism and not sedition on part of the accused. Sedition is when he accused wish to bring *"hatred or contempt or excites or attempts to excite disaffection"*<sup>49</sup>. An act of sedition must not be equated with an act of terrorism. And it must be the responsibility of the State and the police to prosecute for such offences.

Same as with the Information Technology Act, the respective offences under the said Act can be investigated by the cyber cell constituted by the respective states. Similarly, other Penal offences under the NIA Act that are under Scheduled offences are prone to exploitation such as counterfeiting of currency and other offences that should not be qualified as a terrorist activity.

The NIA Act overlaps the Penal Code that can lead to a lack of coordination between the National Investigation Agency and the Police force for the same offence or may even compromise the entire investigation. Furthermore, the NIA Act allows the NIA to take over investigations from the State; the takeover of investigations may have a dreadful impact on the ongoing investigation. Transfer of Investigations takes time, and this time can lead to comprise of the entire

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<sup>46</sup> Black's law Dictionary, (6<sup>th</sup> ed. 1994).

<sup>47</sup> Oxford English Dictionary, (8<sup>th</sup> ed. 2010).

<sup>48</sup> PEN. CODE. § 124A.

<sup>49</sup> *Id.*

proceedings, which may lead to failure of justice. Also, Section 156<sup>50</sup> of the Code of Criminal Procedure clearly provides that investigation of a cognisable offence will be done by “any officer in charge of a police station”.

The section 2 clause (O) provides for the definition of officer in charge.

*“(o) “officer-in-charge of a police station” includes, when the officer-in-charge of the police station is absent from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station-house who is next in rank to such officer and is above the rank of a constable or, when the **State Government** so directs, any other police officer so present;”*<sup>51</sup>

The definition of “officer in charge” is the same in code of 1898 and 1973 and specifically mentions that the State Government will direct the police ranking. The drafters of the Constitution must have in mind that Police will be a state subject and the code give a clear definition for “officer in charge” and let the state decide as to what the officer in charge means.

## **National Investigation Agency Act, 2008 and The Constitution**

The validity of the National Investigation Agency, 2008 was upheld in *Pragya Singh Chandra Pal Singh Thakur v. National Investigation Agency*.<sup>52</sup> It is pertinent to note here that two questions arise. Firstly, whether the parliament has the competence to make such an investigation agency of a national level. Secondly, can the Union Government’s Act snatch the investigating powers of the police with Section 6 and 8 of the NIA Act? To assess the powers of the Union Government in making such an Act, it is important to be familiar with the intent of the constitution-makers.

The Original entry to be mentioned in the Constitution was the Central Bureau of Intelligence<sup>53</sup>

Dr B. R. Ambedkar said:

*“The idea is this that at the Union office there should be a sort of Bureau which will collect all information with regard to any kind of crime that is being committed by people throughout the*

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<sup>50</sup> CODE CRIM. PROC. §156.

<sup>51</sup> CODE CRIM. PROC. §2, cl. o.

<sup>52</sup> *Pragya Singh Chandra Pal Singh Thakur v. National Investigation Agency*, 2013 SCC OnLine Bom 1354.

<sup>53</sup> *Supra* note 2.

*territory of India and also make an investigation as to whether the information that has been supplied to them is correct or not and thereby be able to inform the Provincial Government as to what is going on in the different parts of India so that they might themselves be in a position to exercise their Police powers in a much better manner than they might be able to do otherwise and in the absence of such information.”<sup>54</sup>*

The constituent assembly made a call to remove the word Investigation from the entry.<sup>55</sup> To which Dr B. R. Ambedkar said:

*“The point of the matter is the word “investigation” here does not permit and will not permit the making of an investigation into a crime because that matter under the Criminal Procedure Code is left exclusively to a police officer. Police is exclusively a State subject; it has no place in the Union List. The word “investigation” therefore is intended to cover general enquiry for the purpose of finding out what is going on. This investigation is not investigation preparatory to the filing of a charge against an offender which only a police officer under the Criminal Procedure Code can do.”<sup>56</sup>*

The intention of the entry is crystal clear, the constitution-makers never intended to make an agency at the national level that would involve in the procedure of investigation or do prosecution of offenders. The schedule VII of the Constitution is a symbol of federalism in India. The Constitution makers intended that police must be an absolute state matter. Furthermore, Entry 8 of List 1 was only meant for the creation of an agency to collect and gather information from across the country and not investigate them on the field. The intention of the entry was never to create an agency as powerful and authoritative as the National Investigation Agency.

The Hon’ble High Court of Bombay in its Judgement of *Pragya Singh Chandra Pal Singh Thakur v. National Investigation Agency*<sup>57</sup> equated the NIA with CBI but failed to appreciate the fact that the CBI must require consent for any investigation from the respective state and the NIA does not. The Hon’ble Bombay High Court held that Entry II of the Concurrent List i.e., Criminal

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> K.N. Goyal, Federal Crimes, 44 Journal of ILI 167 (2002).

<sup>57</sup> 2013 SCC OnLine Bom 1354.

Procedure can cover the NIA, but the Court has failed to appreciate that the said entry allows for the enactment of procedural laws and not an entire National level Investigation Agency. Further, the Doctrine of repugnancy states that the Union Law prevails over State Law in the matter involving the Concurrent list, but the Union must not make an Act under Concurrent list and overlap it with the State List. Article 246 of the Constitution<sup>58</sup> allows the Union to make laws exclusively mentioned under the Union list and the concurrent list. It prohibits the Union for making any law that may collide with the state list. The reasoning of Hon'ble Bombay High Court to Entry II of the concurrent list is abrupt. If the constitution makers had an intention to create a Union Level force with such power, then it would have been mentioned in the Concurrent List.

The Hon'ble High Court of Bombay has harmoniously constructed the Act under Union list and the Concurrent list. The Union has been given the upper hand when there is a repugnancy in-law made under Schedule VII. There are several entries in schedule VII where the laws enacted by the parliament and the state have collided due to likeness of entries. The constitution-makers have very noticeably drafted the entries related to security forces.

The entry 2 and 2A of List I mentioned herein:

*"2. Naval, military and air forces; any other armed forces of the Union."*<sup>59</sup>

*[2A. Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.]*<sup>60</sup>

The entry 2 of List II mentioned herein:

*"[2. Police (including railway and village police) subject to the provisions of entry 2A of List I.]"*<sup>61</sup>

The entries related to forces and police have been firmly drafted as to demarcate the scope of legislative competence of Parliament and the States respectively very clearly. These entries are a symbol of Federal structure where the States are given the autonomy to control the police

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<sup>58</sup> INDIA CONST. art. 246.

<sup>59</sup> INDIA CONST. sch. VII, list. I, entry. 2.

<sup>60</sup> INDIA CONST. sch. VII, list. I, entry. 2A.

<sup>61</sup> INDIA CONST. sch. VII, list. II, entry. 2.

forces and investigations within the State territorial jurisdiction and the Union has the control of defence forces. The National Investigation Agency has powers and ambit very equivalent to that of police forces and it does not fall under the above entries.

## Conclusion

The Suo Moto cognizance power and to act without the consent of the State Government with the Central Government read in the light of the Scheduled offences in the National Investigation Agency Act that also includes Penal Code offences creates room for utter arbitrariness and gives unnecessary powers to the Union. This arbitrariness is violative of Article 14.<sup>62</sup> The consent of the concerned state should be necessary.

The Court in *E. P. Royappa v. State of Tamil Nadu*<sup>63</sup> observed that:

*“Equality and arbitrariness are sworn, enemies.”*<sup>64</sup> *“Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.”*<sup>65</sup>

The Hon'ble Supreme Court in *Maneka Gandhi v. Union of India* observed:

*“The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be “right and just and fair” and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied”.*<sup>66</sup>

The Hon'ble Supreme Court has reiterated in various judgments that when a law is arbitrary it will be violative of Article 14<sup>67</sup> and must be struck off. *“What is manifestly arbitrary is obviously*

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<sup>62</sup> INDIA CONST. art. 14.

<sup>63</sup> (1974) 4 SCC 3.

<sup>64</sup> EP Royappa v. State of Tamil Nadu, (1974) 4 SCC 3.

<sup>65</sup> *Id.*

<sup>66</sup> Maneka Gandhi v Union of India, AIR 1978 SC 597.

<sup>67</sup> INDIA CONST. art. 14.

*unreasonable and being contrary to the rule of law, would violate Article 14.*<sup>68</sup> The provisions of the NIA Act are arbitrary and also the procedure established is oppressive, therefore they are violative of Constitution. Section 6, 7 of the National Investigation Agency Act, 2008 are arbitrary and violative of the Constitution of India. The sections must be declared ultra vires to the Constitutional principles.

The National Investigation Agency Act, 2008 was brought with the intention to fight against terrorist activities. The Penal offences are subject of the state as per the Code of criminal procedure and State List and must remain so. The NIA must deal with matters related to terrorism activities and not Penal offences that are not linked to terrorism. Scheduling other offences under the NIA Act that are not linked to terrorism allows the Central Government to act in wrong and erroneous political spirit. The NIA must only be allowed to counter terrorism-related offences and that too with State Government permission.

From the intention of the constitution-makers, it is clear that the word “*Investigation*” never meant the creation of central bureau that can investigate offences and also criminal procedure left with the police which is an exclusive State Subject. The intention of constitution maker coupled with the definition of “*officer in charge of the police station*” gives an implication that the constituent assembly wanted the investigation of offences under the full purview of the State through the medium of police. The entries in schedule VII of the Constitution gives a clear structure of the division of legislative competence in respect of police forces and armed forces. The NIA Act goes far beyond the true meaning of the Entry 8 of List 1 as it not only against the actual intention of the constitution-makers but also overlaps the Entry II of List II as without the consent of the State the Police investigation powers are taken away. Hence, the Parliament lacks the competence of enacting the National Investigation Agency Act, 2008. The National Investigation Agency Act, 2008 is ultra vires to the Intention of the Constitution Makers and thus must be declared unconstitutional.

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<sup>68</sup> Shayara Bano v Union of India, 2017 SCC OnLine SC 963.